(13) (14)

Nos. 89-1838 and 89-1845

In the Supreme Court of the United States

OCTOBER TERM, 1990

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Constitution, statutes and regulations:

Regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1838

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

No. 89-1845

ALI BOURESLAN, PETITIONER

v.

ARABIAN AMERICAN OIL COMPANY, ET AL.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

---

1. As respondents recognize (Resp. Br. 10), this case presents an issue of statutory construction: whether Title VII prohibits discrimination by an American employer against an American citizen outside of the United States. The text of the statute, given its plain and ordinary meaning, prohibits such discrimination. Title VII's broad jurisdictional provisions reach discrimination abroad by American employers; the exemption with respect to *aliens* employed "outside any State," 42 U.S.C. 2000e-1, establishes that the statute was intended to apply to American *citizens* outside any State; and the re-

mainder of Title VII is consistent with that interpretation.

Respondents' answers to each part of this showing are unconvincing. Further, there is no merit to the unifying theme of respondents' brief—an attempt to recast the presumption against extraterritoriality from "a valid approach whereby unexpressed congressional intent may be ascertained," *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285 (1949), into a "strong presumption" (Resp. Br. 6, 12) abrogating customary principles of statutory interpretation.

a. Respondents contend (Resp. Br. 17-25) that Title VII's definition of "commerce" does not reach workplaces outside the United States. They are wrong. The statute's jurisdictional provisions draw no distinction between workplaces inside and outside this country. To the contrary, Title VII prohibits "unlawful employment practice[s]" by "an employer engaged in an industry affecting commerce," and "commerce" includes "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof." 42 U.S.C. 2000e(b), (g), (h), 2000e-2(a). These broad provisions make the statute's applicability to discrimination dependent on whether an employer is engaged in an industry affecting commerce—not on where the discrimination occurs.[1]

The jurisdictional provisions of Title VII were carefully framed; when Congress intended to limit Title VII's application to employment at a particular place, it expressed that intention in precise language tailored to the statute's scheme of coverage. That explains why the alien exemption is framed as it is. On the heels of the broad definition of "employer," that exemption provides that

[1] There is nothing in Title VII that is comparable, for instance, to Section 13(f) of the Fair Labor Standards Act, 29 U.S.C. 213(f), which provides that the Act "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country * * *." It was the ADEA's incorporation of this provision that led courts to conclude that it did not apply extraterritorially. See EEOC Br. 31 n.29.

the Act shall not apply to "an employer" with respect to the employment of aliens outside any State, 42 U.S.C. 2000e-1.

The fact that Title VII's jurisdictional provisions do not use the term "foreign commerce" or "foreign nations" does not suggest, as respondents contend (Resp. Br. 17-18), that the statute reaches only commerce within the limits of the United States, its territories, and possessions. For one thing, respondents themselves say that the inclusion of those would-be magic words would not alter their interpretation of the statute. *Id.* at 19. But more fundamentally, commerce between "a State and *any place outside thereof*," 42 U.S.C. 2000e(g) (emphasis added), plainly includes commerce with foreign nations; indeed, since Title VII defines "States" to include States, the District of Columbia, and specified territories (42 U.S.C. 2000e(i)), the statute must be referring to areas beyond the territorial limits of the United States.[2] Respondents' assertion that this clause "provide[s] the jurisdictional nexus required to regulate commerce that is not wholly within a single state, presumably as it affects both interstate and foreign commerce" but not to "regulate conduct exclusively *within* a foreign country" (Resp. Br. 21 n.14) finds no support in the language of the statute.

[2] In the House, Representative Celler introduced a memorandum stating that "Title VII covers employers engaged in industries affecting commerce, that is to say, interstate and foreign commerce and commerce within the District of Columbia and the possessions." 110 Cong. Rec. 1528 (1964). Accord *id.* at 2737 (remarks of Rep. Libonati). Respondents rely (Resp. Br. 19-20) on an ambiguous memorandum introduced into the *Congressional Record* during debate in the Senate. That memorandum stated both that commerce for purposes of Title VII "is, generally speaking, interstate commerce, but includes commerce within U.S. possessions and the District of Columbia" and that such commerce "is, in short, that commerce to which the regulatory power of Congress extends under the Constitution * * *." 110 Cong. Rec. 7212 (1964). Nothing in the Senate memorandum warrants a departure from the unambiguous statutory text. Respondents concede that Congress "has the power to legislate extraterritorially" (Resp. Br. 10).

Nor does the deletion in the Senate of legislative declarations referring to (among other things) "commerce • • • with foreign nations" manifest any intention to restrict Title VII's scope. Compare Resp. Br. 18-19.[3] The substitute amendment that deleted the declarations made no material change in Title VII's operative provisions—the definitions of "employer," "commerce," and "industry affecting commerce" and provisions prohibiting "unlawful employment practices"—that determine the discrimination to which the statute applies. Indeed, in explaining the amendment, Senator Humphrey stated that "[t]he basic coverage and the substantive prohibitions of the title remain almost unchanged" and that "[t]he title continues to apply to employers • • • in industries affecting commerce." 110 Cong. Rec. 12,721 (1964). Significantly, the deletion was not restricted to the declarations' reference to "foreign nations." That reference, a parallel reference to "commerce among the States" (110 Cong. Rec. 12,811 (1964)), a statement that "it is the national policy to protect the right of the individual to be free from • • • discrimination" (*ibid.*), and other declarations were jettisoned en masse. At all events, the motivation behind the deletion was plainly directed only at the declarations as such, not at the operative provisions of the statute; whatever that motivation was, the deletion was no more an attempt to alter the statute's application to foreign commerce than it was an indication that Congress had somehow abandoned the goal of prohibiting discrimination affecting "commerce among the States."

---

[3] The declarations were initially included in Section 2 of H.R. 405, 88th Cong., 1st Sess. (1963). They were amended when H.R. 405 was incorporated into H.R. 7152, 88th Cong., 1st Sess. (1963), the bill ultimately enacted, as amended, as Title VII. As part of the compromise amendment (No. 656) that was substituted in the Senate for the version of H.R. 7152 passed by the House, the declarations were deleted. See 110 Cong. Rec. 12,811, 12,818 (1964). The only mention of the deletion was a terse statement in a memorandum introduced by Senate Dirksen into the *Congressional Record*: "Section 701: This section consisting of findings and declaration of policy is deleted in its entirety." 110 Cong. Rec. 12,818 (1964).

Finally, Title VII's reference to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 402(c), which in turn incorporates the Labor-Management Relations Act of 1947, 29 U.S.C. 141 *et seq.*, does not speak to Title VII's application to discrimination by American employers against American citizens abroad. See Resp. Br. 22-23. In *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 143 (1957), on which respondents heavily rely, this Court held that the LMRA does not cover "labor disputes between nationals of other countries operating ships under foreign laws." This is not a case, like *Benz*, involving foreign nationals and foreign employers. See pp. 13-15, *infra*. In fact, because *Benz* involved a labor dispute aboard a ship present in American territorial waters, it underscores the force that the participants' *nationality*—the basis for Title VII's application to this case—had in determining the applicability of American law.

b. Respondents' efforts to limit the significance of the alien exemption are equally implausible. In their view, the provision serves the "dual purposes" of "exempt[ing] employers of aliens from coverage in U.S. 'possessions' and • • • confirm[ing] the coverage of aliens in the United States" (Resp. Br. 26; see *id.* at 7). Neither alternative withstands analysis, and no reasonable draftsman could have conceived of the alien exemption as a means of accomplishing both at once.

i. Respondents' first explanation of the exemption involves a labyrinthine expedition into the far recesses of legislative history in order to attribute to Congress an intention to divide the world into three parts: (1) "States" (as defined by the Act), in which both aliens and American citizens are entitled to Title VII's protection; (2) "possessions," consisting of military bases and leased areas on foreign soil, in which American citizens, but not aliens, are protected; and (3) all other areas, in which Title VII does not apply at all. Resp. Br. 27. At the outset, it bears emphasis that this tripartite division finds no support in the statutory text. To the contrary, the alien exemption draws a line between employment

within a "State" and employment "outside any State." Confronted with that express division, respondents nonetheless offer no evidence whatever (1) that any member of the Congress that enacted Title VII viewed Americans employed abroad but outside possessions to be less deserving of protection than those employed inside possessions, or (2) that the alien exemption was conceived as a means of communicating that policy choice.

The historical record provides not a shred of support for respondents' speculation that the alien exemption was initially drafted—and later understood by the 1964 Congress—to limit Title VII's protection of Americans abroad to possessions of the type at issue in *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377 (1948). In *Vermilya-Brown*, this Court held that the Fair Labor Standards Act was applicable to both aliens and American citizens employed on a Lend Lease base in Bermuda. Coverage for that type of possession continued until 1957, when Congress narrowed the FLSA's coverage to the States and specified other jurisdictions. See Act of Aug. 30, 1957, Pub. L. No. 85-231, § 1, 71 Stat. 514. In those locations, as before, aliens and citizens were both entitled to the benefits of the Act; elsewhere, including American possessions, neither category of persons was protected.

Fair employment bills introduced before and after 1957 did not follow the FLSA model. The alien exemption—which appeared in H.R. 4453, 81st Cong., 1st Sess. (1949), a few weeks after this Court's decision in *Foley Bros.*—distinguished between American citizens and aliens with respect to employment anywhere outside a specified list of jurisdictions. Possessions of the type at issue in *Vermilya-Brown* were excluded from the list of jurisdictions in which aliens would be covered, but that does not suggest that those possessions were to be the only sanctuaries abroad in which Americans would be protected from discrimination. After 1957, when Congress overturned *Vermilya-Brown* by withdrawing FLSA coverage from Americans and aliens working in American possessions, there was no corresponding change in fair employment

bills up to the passage of Title VII. Respondents offer no evidence whatever that any member of the Congresses that considered these bills perceived a connection between the FLSA and employment discrimination legislation; to the contrary, fair employment bills, including Title VII, did not include a provision limiting coverage for Americans comparable to the FLSA amendment that Congress fashioned, after some delay, in response to *Vermilya-Brown*.[4]

In an effort to buttress their assertion that the alien exemption focused on American possessions, respondents also suggest that the fair employment bills in which the exemption first appeared were focused upon federal employment. We are told, for instance, that the first bill to contain the alien exemption (H.R. 4453, *supra*) was a bill that would have "govern[ed] the United States as employer and contractor" and "covered government employers and government contractors as well as certain private employers." Resp. Br. 27, 28; see also *id.* at 28-29, 32 n.25. Respondents' emphasis on the proposed legislation's applicability to federal employment—which is calculated to supply a motive for special treatment of U.S. government possessions—is both misleading and irrelevant.

As reported by the House Committee on Education and Labor, H.R. 4453 would have been applicable to any employer "engaged in commerce having in his employ fifty

[4] The absence of such a parallel should come as no surprise. The FLSA is designed to raise standards for workers generally by denying employers the competitive advantage that they might otherwise derive from paying low wages or requiring long hours. Indeed, employers who violate the FLSA are required to remit to the government any damages corresponding to employees who cannot be located. See, *e.g.*, *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968). This statutory policy is dependent upon the statute's applying to all employees of a covered employer. Title VII, by contrast, is designed to protect potential victims of discrimination from its invidious effects—in terms of the Commerce Clause, to protect commerce from the losses flowing from underuse of qualified personnel because of invidious discrimination. That goal does not suggest a coverage scheme identical to the FLSA's.

or more individuals" (excluding state and local governments and certain nonprofit institutions), as well as the federal government. Thus, from the time in 1949 when the alien exemption first made its appearance in proposed legislation, fair employment bills were drafted to provide broad protection to American citizens employed by private employers—whether or not that employment had any relationship to the federal government. Indeed, in 1964, Congress chose not to extend Title VII to federal employment, thus confirming that the alien exemption was not meant to be a remarkably indirect way of targeting federal facilities abroad.[5]

In the final analysis, the first of respondents' two explanations of the alien exemption treats that provision as a very odd historical remnant—a provision drafted with a view to a 1948 decision construing the FLSA, for inclusion in a bill focused on federal employment, which was unthinkingly carried forward into civil rights legislation that neither paralleled the FLSA nor covered federal employees. This tortuous use of unconnected materials should not obscure one clear, salient point—the 1964 Congress was not indifferent to the meaning of one of the very few exceptions to Title VII. The exemption played a logical and important role—which was clear from its language and confirmed by committee reports, see EEOC Br. 16—in the scheme that Congress actually enacted. The exemption does precisely what it says; it limits Title VII's application as to *aliens* (and thus establishes the statute's application to American citizens) in all territory "outside any State."

[5] Significantly, respondents' interpretation of the exemption is inconsistent with their own view of the principles of statutory interpretation applicable to this case. The United States does not exercise territorial sovereignty over the "possessions" on which respondents' interpretation focuses. Thus, under respondents' theory, the presumption against extraterritoriality should be as potent a bar to Title VII within those possessions as it is in other foreign territory. See *Vermilya-Brown Co.* v. *Connell*, 335 U.S. at 381 (noting that application of FLSA to Lend Lease base involved regulation "outside the territorial jurisdiction of the United States"); *Foley Bros.* v. *Filardo*, 336 U.S. at 285 (explaining *Vermilya-Brown* as a case in which the presumption was satisfied).

ii. We explain in our opening brief why the alien exemption could not have been conceived as a backhanded means of extending protection to aliens employed in the United States. EEOC Br. 14-15. Respondents nevertheless persist in their view that the alien exemption could have been included in Title VII as a "meaningful and useful way to confirm" that coverage. Resp. Br. 8; see *id* at 30-31. But this would have been odd draftsmanship in the extreme; Congress does not include exemptions in legislation for the purpose of providing courts indirectly with material to guide the interpretation of other provisions. The function of the alien exemption is simple and straightforward: to withdraw statutory coverage from aliens employed "outside any State." In so doing, the exemption demonstrates—as a matter of statutory construction—both that the statute covers aliens within the United States (see *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 95 (1973)) and, *with equal force*, that Americans employed abroad are protected.

c. Respondents identify various issues that they believe Congress "would have" addressed differently if it had intended to apply Title VII to discrimination abroad by American employers against American citizens. Resp. Br. 34-39. But the features of Title VII that respondents portray as statutory holes are not at all incompatible with its application to Americans employed by American employers abroad. As we demonstrate in our opening brief (EEOC Br. 18-22, 29-30), Title VII's basic enforcement framework is available to an American citizen who, like Ali Boureslan, alleges that he was the victim of discrimination by an American employer outside of the United States. Such an individual may file a charge with the EEOC; the Commission is authorized to conduct an investigation, issue or withhold a reasonable cause determination, attempt conciliation, and issue a right to sue letter; and, when either the individual or the Commission has commenced an action, judicial processes are available to obtain evidence, fashion a remedy, and enforce it.

Beyond this, the matters respondents raise present questions of policy. It is up to Congress to determine whether procedural deference afforded to state fair employment proceedings should be accompanied by "parallel provisions" addressing foreign laws (Resp. Br. 35); whether the alien exemption or the BFOQ defense is "an inadequate tool for minimizing conflicts of law" (*id.* at 36 n.30; see *id.* at 35-36 n.29); whether a broader choice of venue should be available to plaintiffs (*id.* at 38); and whether it would be wise to provide the Commission with broader subpoena power (*id.* at 39 & n.33).[6] For the reasons stated in our opening brief, we see nothing anomalous in the answers Title VII supplies to these questions. In fact, many of those answers are the same as those provided by the ADEA, a statute respondents now trumpet as reflecting "careful consideration" (Resp. Br. 36) of extraterritorial application of law.[7] But in any event, respondents' assertions regarding what Congress "would have" done do not undercut the conclusion that flows from the statute's jurisdictional provisions and the alien exemption.

---

[6] Respondents are mistaken in their contention that the scope of an agency's subpoena power is indicative of a limitation on the extraterritorial application of the statute. The assertion of claims arising from foreign conduct is entirely distinct from the service of compulsory process on foreign territory. Unlike the service of a complaint on foreign soil (which merely gives notice of a claim), other nations may regard the service of compulsory process as a violation of their sovereignty. See *SEC* v. *International Swiss Investments Corp.*, 895 F.2d 1272, 1276 (9th Cir. 1990); see *FTC* v. *Compagnie de Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1313 (D.C. Cir. 1980).

[7] The ADEA, like Title VII, provides for procedural deference to state proceedings (29 U.S.C. 633), but it provides no comparable deference to foreign age discrimination proceedings. So too, the EEOC's subpoena power is substantially identical under both statutes. Compare 29 U.S.C. 161(1) (incorporated in 42 U.S.C. 2000e-9) with 15 U.S.C. 49 (incorporated in 29 U.S.C. 209, 626(a)). In addition, Title VII has been construed to provide defenses similar to that conferred by 29 U.S.C. 623(f). See EEOC Br. 27-28 & nn.23-24.

d. The principal refrain of respondents' brief is that the presumption against extraterritoriality establishes a very demanding clear-statement test. In respondents' view, that canon of construction is a "strong presumption" (Resp. Br. 6, 12) requiring a "clear and affirmative expression" (*e.g.*, *id.* at 7, 13, 14, 17, 21) of intention to reach conduct outside the United States. A "negative inference," respondents argue (*id.* at 7, 11, 32), is insufficient. Not content with arguing for their understanding of that canon, respondents suggest that we share it. *Id.* at 9-10. They err in both respects. We believe that the language of Title VII would satisfy a stringent formulation of the presumption; nevertheless, respondents substantially overstate the force of that canon.

i. In *Foley Bros.*, this Court described the presumption against extraterritoriality as follows (336 U.S. at 285):

> The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States * * * is a valid approach whereby unexpressed congressional intent may be ascertained.

That same formulation was repeated in the most recent decision in which this Court referred to the presumption. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 440-441 (1989). By its terms, this canon serves only to clarify "unexpressed congressional intent," and places no limitations on the form that the showing of "contrary intent" may take.

The canon described in *Foley Bros.* is not, therefore, a "strong presumption" (Resp. Br. 6, 12) suspending customary principles of statutory interpretation. As this Court's decisions reflect, the requisite intention to apply a statute abroad may be found in the language of the statute—informed by due consideration of the statute's purposes, legislative history, administrative interpreta-

tions, and other pertinent materials.[8] The presumption does not impose drafting requirements on Congress, compelling it to use a particular form in order to assure that a statute will apply abroad. Nor does it mandate a search within a statute for a single discrete provision that respondents might characterize as "affirmative" rather than "negative." The combination of broad jurisdictional provisions and an exemption for aliens abroad (meeting the precise concern expressed in *Foley Bros.*) is an entirely natural and sufficient means of expressing an intention to cover Americans employed abroad.

Finally, in the face of the language of Title VII, the presumption does not require a demonstration that members of Congress engaged in some measure of debate over extraterritorial applications (see Resp. Br. 11, 20 n.12) showing members of the legislature "actually thought about" the question (*id.* at 5-6; see *id.* at 8, 10, 11). The scope of a statute is not limited to applications mentioned in its legislative history, *Pittston Coal Group* v. *Sebben*, 488 U.S. 105, 115 (1988). The *Foley Bros.* canon does not justify respondents' departures from basic principles of statutory interpretation.[9]

---

[8] This Court has never suggested, for instance, that the *Foley Bros.* canon is comparable to the clear-statement principle by which the Court determines whether Congress has intended to impose liability on the States, notwithstanding the Eleventh Amendment. In light of "[t]he fundamental nature of the interests implicated by the Eleventh Amendment," "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242 (1985).

[9] We do share common ground with the respondents as to the reach of the antitrust and securities laws. We agree that Congress intended these statutes, which provide for both civil and criminal enforcement, to extend extraterritorially (Resp. Br. 25). See, *e.g.*, *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962); *Schoenbaum* v. *Firstbrook*, 405 F.2d 200, 206, modified on other grounds, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969). Various other criminal statutes have also been given extraterritorial effect. See, *e.g.*, *United States* v. *Wright-Barker*, 784 F.2d 161 (3d Cir. 1986); *United States* v. *Baker*, 609 F.2d 134 (5th Cir. 1980).

ii. Respondents derive their more demanding version of the *Foley Bros.* canon from heavily edited quotations from cases in which this Court discussed the application of American law to *aliens* on *foreign soil* or *foreign flag vessels*. For instance, in *Foley Bros.*, this Court insisted on "a clearly expressed purpose" to apply the Eight Hour Law to *Iranian nationals in Iran* (336 U.S. at 286 (emphasis added)):

> No distinction is drawn [in the Eight-Hour Law] between laborers who are aliens and those who are citizens of the United States. Unless we are to read such a distinction into the statute we should be forced to conclude, under respondent's reasoning, that Congress intended *to regulate the working hours of a citizen of Iran who chanced to be employed on a public work of the United States in that foreign land.* Such a conclusion would be logically inescapable although labor conditions in Iran were known to be wholly dissimilar to those in the United States and wholly beyond the control of this nation. An intention *so to regulate* labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.[10]

Title VII does not seek "so to regulate" labor conditions of aliens employed in a foreign land.

Similarly, *Benz*, *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963), and *Sandberg* v. *McDonald*, 248 U.S. 185, 195 (1918), all involved attempts to apply American law to aliens employed on foreign flag vessels (which the law views as analogous to foreign soil, see, *e.g.*, *Cunard S.S. Co.* v. *Mellon*, 262 U.S. 100, 123-124 (1923)). In *Benz*, the Court concluded, "[o]ur study of

---

[10] Respondents' quotation from *Foley Bros.* omits the word "so" and the material to which it refers, and also presents the last sentence quoted above as an elaboration on the canon of construction appearing a page earlier in the Court's opinion. See Resp. Br. 14-15.

[the LMRA] leaves us convinced that Congress did not fashion it to resolve labor disputes between nationals of other countries operating ships under foreign laws." 353 U.S. at 143. As in *Foley Bros.*, the Court's reference to a clear and affirmative statement of Congress's intention was specifically linked to that type of application (353 U.S. at 146-147):

> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.

Likewise, in *McCulloch*, the Court framed the "basic" question as "whether [the NLRA] as written was intended to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19. Adhering to the holding in *Benz*, the Court in *McCulloch* found that the NLRA failed to describe "the boundaries of the Act as including foreign-flag vessels manned by alien crews." *Id.* at 20. The Court quoted from *Benz* after describing how application of the NLRA would result in a "head-on" collision with Honduran law governing Honduran crews aboard Honduran flag vessels.[11]

This case involves no comparable attempt to extend American law to alien employees abroad; to the contrary, the alien exemption precludes any such applications of Title VII. Thus, the skepticism the Court expressed in *Foley Bros.*, *Benz*, and *McCulloch* regarding the reach of American law has no applicability here. There is no rea-

[11] In *Benz* and *McCulloch*, the application of American law to labor disputes involving aliens employed aboard foreign-flag vessels might well have violated international law. See *McCulloch*, 372 U.S. at 21 (referring to "the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118 (1804), that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .'"). That interpretive principle has no application in this case.

son to question the conclusion flowing from Title VII's express provisions that Congress intended to protect Americans employed outside the United States from discrimination by American employers.[12]

2. Respondents and their *amici* advance a varied assortment of claims regarding the role that international law should play in this case. Our fundamental point in response is this: international law does not foreclose the extraterritorial application of Title VII in the context of U.S. employers which discriminate against U.S. citizens.

a. In the first place, international law is relevant to this case only as an aid to the interpretation of Title VII. As a general rule, statutes are construed, when fairly possible, to conform with established principles of international law. See, *e.g.*, *Weinberger* v. *Rossi*, 456 U.S. 28, 32 (1982); *Lauritzen* v. *Larsen*, 345 U.S. 571, 577 (1953). There is, however, no difficulty in construing Title VII to conform to well-established international norms.

The only issue of international law presented by this case is whether the United States has jurisdiction to prescribe a rule prohibiting discrimination abroad by American employers against American citizens. Respondents' position is that Title VII may *never* be applied to such discrimination. Yet, they admit that the ADEA—the validity of which they do not contest under international law—does precisely that. And rightly so. As this Court has noted, "the United States is not debarred by any rule of law from governing the conduct of its own citizens * * * in foreign countries when the rights of other nations

[12] Respondents argue that there is no meaningful distinction between the individual right to freedom from discrimination protected by Title VII and the rights protected by federal labor legislation. Resp. Br. 25-26 n.20. Employee rights under the NLRA, however, are designed to facilitate *collective action* by employees. The individual rights needed to facilitate those activities obviously cannot be conferred selectively on Americans abroad; it would make little sense to confer the rights to join a union, organize, elect representatives, and strike on less than all members of a bargaining unit.

or their nationals are not infringed." *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285-286 (1952); see *Skiriotes* v. *Florida*, 313 U.S. 69, 73 (1941); *Vermilya-Brown Co.* v. *Connell*, 335 U.S. 377, 381 (1948). Recognition of authority to prescribe law for nationals does not violate any "fundamental concept of sovereignty" (Resp. Br. 12) and is not "inconsistent with the international principle of national sovereignty" (Rule of Law Comm. Br. 5). The international community does not adhere to any ironclad rule "that nations have the right to regulate conduct within their own borders and not within the borders of another sovereign" (Resp. Br. 12). Likewise, the exercise of prescriptive jurisdiction to prohibit discrimination by American employers against American citizens cannot be regarded as "imposing Title VII on other countries" (*id.* at 40; see *id.* at 8).

The fact that the authors of the Restatement characterize nationality as an "exceptional basis" for prescriptive jurisdiction does not suggest that it is in any way disfavored. Compare Resp. Br. 4, 13, 24 n.18; Rule of Law Comm. Br. 8, 9. In fact, in the area of anti-discrimination legislation, nationality has come to be the customary basis for the extraterritorial application of American law.[13] Although respondents and their *amici*

[13] See 5 U.S.C. 7201 note (prohibiting discrimination, unless required by treaty, by Department of Defense against American citizens at foreign military bases); 22 U.S.C. 5001(5), 5034-5035(a) (requiring "national[s] of the United States" employing more than 25 persons to conform to a "Code of Conduct" regulating employment practices in South Africa); 29 U.S.C. 623(a) and (h), 630(f) (prohibiting age discrimination against American citizens employed abroad by American corporations or foreign corporations controlled by American employers); 42 U.S.C. 2000e-16(a) (extending protection from discrimination by the federal government to "[a]ll personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States)"); 50 U.S.C. App. 2407(a)(1)(B), 2415(2) (directing the President to promulgate regulations prohibiting any "United States person" from engaging in employment discrimination, in compliance with foreign boycotts, against "United States person[s]"). Respondents and their *amici* downplay or ignore these statutes in their discussion of the nationality principle. Resp. Br. 13; Rule of Law Comm. Br. 6 n.6. As these examples reflect, anti-discrimination statutes are not regarded as laws addressing "predominantly local activities, such as industrial and labor relations" (Rule of Law Comm. Br. 10 (quoting Restatement (Third) of the Foreign Relations Law of the United States § 414, comment c, at 271 (1986) [hereinafter *Third Restatement*]); Resp. Br. 25.

The Department of Labor has exercised authority conferred by Exec. Order No. 11,246, § 204, 3 C.F.R. 342 (1964-1965 comp.) to exempt "work performed outside the United States" from anti-discrimination regulations applicable to government contracts, but only when "no recruitment of workers within the limits of the United States is involved." 41 C.F.R. 60-1.5(a)(3). Compare Soc. Hum. Res. Mgt. Br. 21 (omitting all mention of the limitation).

call attention to some countries' resistance to applications of American antitrust law and other economic regulation (Resp. Br. 25 n.19; Rule of Law Comm. Br. 18 n.16), they cite not a single instance in which the ADEA or other anti-discrimination statutes that apply abroad (see note 13, *supra*) have been regarded as a violation of international law.

b. Respondents and certain *amici* suggest that in the area of employment discrimination, jurisdiction to prescribe law for a state's nationals has been circumscribed by a practice of restricting anti-discrimination laws to the territorial limits of the prescribing state or by international agreements. The fact that some nations have chosen not to prohibit their nationals from discriminating against one another beyond their borders falls far short of what is required to establish a rule of international law: "a general and consistent practice of states followed by them *from a sense of legal obligation.*" *Third Restatement* § 102(2) & comment c (emphasis added).[14]

On their face, the international agreements on which respondents and their *amici* rely do not purport to withdraw prescriptive jurisdiction that the signatories enjoy under the nationality principle. Compare Resp. Br. 40;

[14] Indeed, by indicating dissent while a rule remains in the process of formulation, a state avoids being bound even after the rule matures. *Third Restatement* § 102, comment d. In view of the ADEA and other American laws, there can be no claim that the United States has recognized such a rule of international law.

Rule of Law Comm. Br. 15. Nor does the agreements' purpose permit such a strained construction; agreements committing nations to the goal of eliminating employment discrimination throughout the world should not be read to withdraw authority those states otherwise enjoy to prescribe law for their own nationals advancing that very goal.

c. The diplomatic notes appended to respondents' brief do not suggest that it would violate international law to apply Title VII to discrimination abroad by American employers against American citizens. See Resp. Br. App. 6a-10a. Rather, the notes urge that, *if* this Court construes Title VII to extend to discrimination by American employers against American citizens, a question on which the notes express no opinion, the statute should be applied in a manner consistent with international law, with due regard for principles of comity and sovereignty. Those understandable concerns lend no support to foreclosing Title VII's extraterritorial application to U.S. citizens.

d. Respondents and their *amici* suggest that "sensitive and sometimes vast cultural differences between this nation and other sovereign states" (Resp. Br. 40), "potentially conflicting standards" (EEAC Br. 18), and discrimination statutes of other nations (Resp. Br. 40) should be held to foreclose Title VII's application abroad. In view of the emerging international consensus against discrimination, it would be wrong to assume that Title VII is so fundamentally out of step with employment practices around the world that Congress could not have intended it to apply at all outside the United States. Moreover, Title VII represents a determined effort to protect Americans from employment discrimination based upon cultural biases and stereotypes, even those that intrude upon international business operations. See *Fernandez* v. *Wynn Oil Co.*, 653 F.2d 1273 (9th Cir. 1981). Title VII is fairly construed to prohibit American employers from incorporating those biases into their dealings with American employees.

Similarly, the fact that foreign states have enacted legislation directed to employment does not, in and of itself, weigh against application of Title VII to American nationals abroad. International law acknowledges that more than one nation may exercise prescriptive jurisdiction over a given subject matter. Here again, since most nations share a common view of employment discrimination, conflicts between such laws will likely be rare.

There is no apparent conflict, for instance, between Title VII's application to this case and the Labor and Workmen Law of Saudi Arabia. Respondents stop well short of asserting such a conflict. They say only that this statute regulates all employment in Saudi Arabia; that it "contains numerous substantive provisions"; that it establishes a "a procedural framework consisting of two judicial commissions"; and that these commissions draw no distinction between citizens of Saudi Arabia and foreign nationals. Resp. Br. 41; see also *id.* at 3. Even assuming the accuracy of these characterizations, there could hardly be any contention that Saudi law compelled the discrimination alleged by petitioner Boureslan, or that application of Title VII to this case would contradict any aspect of the Kingdom's law. There is no indication that this case presents anything beyond the exercise of concurrent jurisdiction. The mere possibility of some conflicts between Title VII and foreign law is no reason to preclude any application of Title VII abroad; rather, any conflicts that do arise may be resolved within the framework of Title VII. See EEOC Br. 27 & nn.23-24.

3. Respondents argue that the EEOC has not been consistent in its interpretation of Title VII with respect to the question presented. They contend that an interpretative regulation promulgated by the Commission in 1970 limited Title VII to employment within the United States (Resp. Br. 44) and that the interpretation conveyed by the EEOC's General Counsel to the Senate Foreign Relations Committee in 1975 "was in conflict with the agency's regulation then in force" (Resp. Br. 44).

Respondents have misread the EEOC's prior regulation. The quoted provision was part of a regulation ad-

dressing national origin discrimination—which focused on discrimination in this country against persons born abroad. To make clear that aliens in this country were entitled to protection against that form of discrimination, the regulation stated that the statute protects "all individuals, both citizens and noncitizens, domiciled or residing in the United States." J.A. 46. By underscoring that *all* individuals were protected in the United States, the regulation did not suggest that *Americans* were protected only when they are present in this country. There is no reason to suppose that the Commission's General Counsel responded to Congress's inquiries regarding Title VII's scope with an unauthorized interpretation of the statute.[15]

* * * * *

For the foregoing reasons and those set forth in our initial brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JANUARY 1991

---

[15] See *Robertson* v. *Methow Valley Citizens Council*, 109 S. Ct. 1835, 1850 (1989); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *INS* v. *Stanisic*, 395 U.S. 62, 72 (1969); *Ford Motor Credit Co.*, v. *Milhollin*, 444 U.S. 555, 556 (1980).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20290